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The Raid on Tunisia - Was The Condemnation of Israel Justified?

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinion and conclusions expressed herein are those of the individual author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

By

Captain Robert S. Johnson, Jr., JAGC
United States Army

The Judge Advocate Officer Graduate Course
April 1986

Thesis Abstract

The Raid on Tunisia - Was The Condemnation of Israel Justified?

by Captain Robert S. Johnson, Jr.

Abstract. The thesis examines the Israeli raid on the headquarters of the Palestine Liberation Organization in Tunisia. This attack raises fundamental questions about the rights of a state to use armed force against alleged terrorists located within the territory of another state. This thesis concludes that the attack by Israel was an act of aggression and not an act of self-defense.

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THE RAID ON TUNISIA - WAS THE CONDEMNATION OF ISRAEL JUSTIFIED?

Introduction

On 1 October 1985, Israel attacked the Palestine Liberation Organization (PLO) headquarters in Tunisia. This attack destroyed three buildings utilized by the PLO and killed many Palestinian and Tunisian men, women, and children.[1] Nations throughout the world and the United Nations Security Council condemned this raid.[2]

The purpose of this article is to analyze this attack and to determine whether it violated international law. In doing so, the theories of self-defense, anticipatory self-defense, reprisals, and aggression will be discussed. Also this article will examine the discussions before the United Nations Security Council concerning the raid to determine what this incident reveals about how a nation should respond to a terrorist attack.

Facts

On 25 September 1985, the Jewish holiday of Yom Kippur, three individuals armed with AK 47's and grenades captured and killed three Israeli civilians, one woman and two men, who were on their yacht moored at Larnaca, Cyprus.[3] The Cypriot police captured the three men responsible for this killing. Two were Palestinian Arabs and one was a British subject. The three were jailed, charged with murder, and will be brought to trial in Cyprus.[4] The apparent purpose behind their terrorist act was to obtain the release of Palestinians captured by the Israelis on a yacht travelling from Lebanon to Cyprus. The three Israelis who were killed were accused by the gunmen of monitoring the movement of these Palestinian boats.[5]

The government of Israel was convinced that the attack was the work of Force 17, a commando unit under the command of Yasser Arafat.[6] The PLO, however, denied responsibility for the attack.[7] Nevertheless, the Israeli cabinet met on 26 September 1985 to determine what course of action should be taken against the PLO in response to the murders. Ezer Weizman opposed any raids by Israeli jets stating that such raids would be an overkill and would destroy the recent peace efforts of King Hussein of Jordan. Ariel Sharon, on the other hand, wanted to attack the headquarters of Arafat's deputy located in Amman, the capital of Jordan. The middle ground, to attack the PLO headquarters in Tunisia, was sponsored by Israel's Defense Minister, Yitzhak Rabin.[8]

The attack began on 1 October 1985 when Israeli fighter bombers left Israel for the 1500 mile, two and a half hour trip, to Tunisia.[9] The attack force consisted of eight F-15's and eight F-16's. An Israeli ship, prepositioned off the coast of Malta, was ready to launch helicopters to pick up any downed pilots. Thus, the Israeli attack, like the Entebbe raid and other similar attacks, was well planned.[10]

Upon reaching the target, the F-16's made the bombing runs while the F-15's remained in reserve.[11] The attack, on an exclusively residential area, lasted for approximately six minutes. During this short period of time, the jets deployed air-to-ground missiles and 500-pound bombs, some with delayed action.[12]

The attack destroyed three buildings utilized by the Palestine Liberation Organization. In addition, numerous men, women, and children were killed. The PLO stated that 67 people were killed - 45 Palestinians and 22 Tunisians - and more than 100 wounded. The hospital in Tunisia, however, stated that the numbers were 47 killed and 65 wounded.[13] Regardless of which report is correct, it is a fact that many innocent individuals were killed and wounded by this attack.

World Reaction

Once the attack became public countries throughout the world were quick to condemn Israel. France condemned the attack claiming it violated the territory of the sovereign, peaceful state of Tunisia. Great Britain stated that even if there was evidence to connect the PLO with the incident in Cyprus, Israel did not have the right to violate the territory of Tunisia. The Soviet Union demanded that the United Nations require Israel to pay reparations and act to ensure such aggressive acts would not occur in the future. China, Turkey, Denmark, and Australia also publicly condemned the attack.[14] When Israel's Foreign Minister, Yitzhak Shamir, appeared before the General Assembly to defend his country's actions many delegates left the Assembly in protest. All twenty-one Arab nations, except Egypt, walked out. These Arab nations were joined by Iran, Vietnam, Nicaragua, Afghanistan, East Germany, and some African nations. The other East Bloc countries, including the Soviet Union, left only a junior member of their delegations in the Assembly.[15]

The United States, on the other hand, appeared uncertain as to its position on the raid. Initially, White House spokesman Larry Speakes stated that the attack was "a legitimate response" to terrorist attacks."[16] President Reagan also appeared to initially approve the attack when he stated that Israel, like other nations in the world, had a right to strike back "if they can pick out the people responsible."[17]

The remarks made by the United States angered the President of Tunisia who stated that the position of the United States was "counter to international and moral law and to the existing relationship between Tunisia and the United States."[18] It must be remembered that the United States had played an important role in persuading the Tunisian government to accept the PLO into their country.[19] Now the United States was condoning an attack on their country which killed many of the citizens of Tunisia.

The United States quickly reassessed its initial position and issued a new statement concerning the raid. In this statement, the White House called the raid "understandable as an expression of self-defense" but said the bombing "cannot be condoned."[20] Secretly, however, Secretary of State George Shultz informed Israel that the United States "remained committed to strong action against terrorists" and that the attack was "a legitimate act of self-defense against a series of terrorist acts ordered by the PLO."[21] President Reagan also privately agreed that the Israeli raid was justified.[22]

Israel's Response

Israel, of course, from the very beginning, defended its action as a legitimate act of self-defense against the headquarters from which the PLO planned terrorist acts against Israel. Israel's Prime Minister Shimon Peres stated: "It was an act of self-defense. Period."[23] Defense Minister Rabin said the raid was meant to show terrorists that "the long arm" of Israeli retribution "will reach them wherever they are."[24] Even though this last statement appears to categorize the raid as a reprisal rather than an act of self-defense, it is clear that the Israelis felt that their actions were completely justified.

United Nations

On 2 October 1985, Tunisia spoke before the Security Council of the United Nations and accused the Israelis of committing a "blatant act of aggression."[25] Tunisia demanded that the Security Council condemn the state of Israel and order the payment of reparations.[26]

The representative of Israel continued to defend the actions of his state as defensive.[27] He accused the PLO in Tunisia of planning, initiating,

and organizing more than 600 attacks in the past year which had killed or wounded over 750 Israeli civilians.[28] He further stated that Force 17, Yasser Arafat's personal body guards, was responsible for the murders at Larnaca and contended that members of Force 17 were in the headquarters in Tunisia. Tunisia, according to Israel, had a responsibility to prevent such terrorist attacks from originating from its territory.[29] This raid was therefore justified to destroy the "nerve center" of PLO operations and any civilian deaths were "wholly inadvertant and unintentional."[30]

One by one members of the Security Counsel spoke and condemned the attack by Israel. This condemnation came not only from the Arab countries but from other nations to include France, China, the Soviet Union, Great Britain, Australia, and Denmark. On 4 October 1985, the Security Counsel voted on a resolution to condemn the state of Israel. Fourteen countries voted in favor of the resolution. The United States abstained.[31]

This resolution "vigorously condemned" Israel for an act of armed agression and demanded that Israel refrain from such acts in the future. It was also agreed that Tunisia had a right to reparations for the loss of life and destruction of property.[32]

Was the attack a lawful act of self-defense against terrorism as Israel contends, or was it an act of aggression in violation of international law and the United Nations Charter? This article will seek to answer that question.

Self-Defense

Customary Law

Any study of the customary international law of self-defense must begin with an analysis of the Caroline case. During the Canadian Rebellion of 1837 many United States citizens, especially ones along the Canadian border, supported the cause of the rebels in Canada. The United States government had tried to restrict such activity, but the efforts had proven unsuccessful. After the rebellion had been defeated in Canada, two of its leaders came to the United States seeking support for their cause. Several hundred Americans joined the rebels in their fight against Great Britain. One group of Americans took over Navy Island, a British possession in the Niagara River. This island was continuously reinforced with men and war equipment and British ships were fired upon from this island. The ship Caroline was one of the ships transporting war materials to the island from the state of New York. The British decided to attack the ship to prevent further reinforcements from reaching the island. A group of 70-80 British soldiers, armed with muskets and swords, attacked the defenseless ship and its passengers while it was docked at Fort Scholossen in New York. The ship was set afire and set adrift. Two people were killed - one of whom was a cabin boy shot while attempting to leave the vessel.[33]

Secretary of State Daniel Webster sent a letter to the British government protesting the attack. In this letter, he outlined his formula for self-defense which is now the cornerstone of customary international law concerning this concept. Mr. Webster stated that in order for a country to claim self-defense it must show a:

> necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation. It will be for it to show, also, that the local authorities of Canada, even

> supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive; since the act, justified by the neccessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the Caroline was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of The United States cannot believe to have existed.[34]

From this letter, two principles of self-defense were established - necessity and proportionality.[35]

The necessity which gives rise to the right of self-defense is not a condition that can be easily met. It has been broadly defined as "action which is necessary for the security or safety of the state."[36] Webster, in his letter, limited this right to situations in which a state was left with no other choice but to use force, thereby implying that peaceful means should be employed prior to attempting a military solution. Thus, it has been stated that a plea of self-defense will only lie when the action by a state was taken "to prevent an immediately impending, irrepable injury and for

that purpose alone."[37] In short, it is an action taken for self-preservation.[38]

The problem with these broad definitions of necessity is that they allow nations the opportunity to reach different conclusions as to when a state can lawfully act. Therefore, countries throughout history have attempted to legitimize aggressive acts as acts of self-defense. For instance, both Germany and Japan pleaded self-defense at the war trials in Nuremberg and Tokyo.[39] The next question, therefore, is who determines when a nation is legally authorized to act in self-defense because of necessity.

Under customary international law, each country determined for itself whether it was necessary to take defensive action. This belief was evidenced by the United States' response to Kellogg-Briand Pact concerning the issue of self-defense. This reply, which is illustrative of the responses of many of the signatories to the Pact stated: "Every nation is free at all times and regardless of any treaty provision to defend its territory from attack or invasion and it alone is competent to decide whether circumstances required recourse to war in self-defense."[40] A strict interpretation of this right would always result in a nation being able to justify an attack and thus prevent sanctions by the international community even if the rest of the world viewed the action as aggressive. However, such an interpretation has been rejected. Even though a country must initially determine whether to act, the lawfulness of the action will be subject to investigation and adjudication by the world community.[41] Therefore, the International Tribunal, citing the Caroline case and the principle of necessity rejected the pleas of self-defense by Germany and Japan.[42] Thus, simply because Israel stated that it acted in self-defense is not determinative of whether her actions were necessary.

The second prong of legitimate self-defense is proportionality. According to one writer, this prong is just as important as the first since there is a tendancy to continue to use force after the needs of self-defense have been met.[43] Therefore, even if a country's actions were necessary, the country could still violate the principles of self-defense if the use of force was disproportionate to that required to remove the threat.

Proportionality requires that the actions of the responding nation be limited in intensity to what is reasonably necessary to secure the permissible objection of self-defense.[44] It entails a limitation on the means utilized and a limitation on the time for the exercise of this right.[45] It must be reasonably proportioned to the object of the attack.[46] If the self-defensive action is in excess of what is needed, the attack constitutes an unlawful use of force.[47] When viewing the issue of proportionality, a rough equivalence in the number of deaths and the extent of property damage is the measuring stick.[48]

Therefore, the two principles of necessity and proportionality govern the doctrine of self-defense in customary international law. This continues to be true even though states have entered into various pacts and convenants to control armed aggression. Two such covenants are the Kellogg-Briand Pact and the Charter of the United Nations.

Kellogg-Briand Pact

The Kellogg-Briand Pact was signed on 27 August 1928. This document, in conjunction with the Charter of the United Nations, governs the use of force by states in the world today.[49] Thus, even though the document was signed over a half century ago, it still must be studied when analyzing the use of force by nations since it provides an "independent source of legal restraint on the use of force."[50]

Article 2 of the Pact requires that all disputes of whatever nature be settled by pacific means. This article is so broad that it covers every conceivable use of force by one nation against another except self-defense.[51]

Even though self-defense is authorized, it is not mentioned or discussed in the Pact. Every signatory to the Pact, however, reserved the right of self-defense. For example, the United States claimed: "That right [self-defense] is inherent in every sovereign state and is implicit in every treaty."[52] The problem created by this practice of reserving the right is determining what each nation meant by self-defense.

Professor Brownlie has convincingly suggested that the right to act in self-defense, as reserved by these countries, was limited to a reaction to a force or threat of force operating against the territory of the state.[53] In making this determination, he points out that when nations renounce war in such terms as used in the preamble to the Pact, any justification to violate such a renunciation would have to be based on exceptional circumstances. Furthermore, the term legitimate self-defense was used during this period to refer to a reaction to an attack or threat of an attack.[54] Lastly and most importantly, the subsequent practices of the parties to the Pact indicates that self-defense is only justified when a country is being attacked or when there is a threat of an attack against its territory.[55]

The conflict between Italy and Ethiopia in 1934 is illustrative of this last point. The district of Walwal is located in Ethiopia, a desert country, and is thereby important because 300 wells are in the district.[56] Italian troops, operating out of Somaliland, had crossed into Ethiopia carrying out reconnaissance expeditions, providing care for the nomadic tribes of Somaliland and policing the nomad tribes of Ethiopia.[57] As time passed a fortified post was constructed by Italy at Walwal.[58] A dispute thus arose between Italy and Ethiopia as to whether this district was under Italy's or

Ethiopia's control. On 5 December 1934 fighting broke out between troops of the two countries over the refusal of the Italian troops to allow the Ethiopian troops the use of additional wells. After a day of fighting the Ethiopian troops fled.[59]

During the remainder of December the situation grew worse with Ethiopia reporting additional Italian military operations in the Walwal area.[60] On 11 January 1935 Ethiopia requested that the Council of the League of Nations consider the problem.[61] When Ethiopia and Italy agreed to enter into negotiations the Council postponed action on Ethiopia's request.[62] When these negotiations failed, arbitrators were appointed in an attempt to settle the dispute.[63] This proved successful in settling the dispute of 5 December 1934 and those that occurred thereafter.[64] However, tension still existed between the two countries.[65]

To avoid any further incidents, the Emperor of Ethiopia announced on 25 September 1935 that he had ordered the relocation of his military forces to a position thirty kilometers from the frontier.[66] On 3 October 1935 Italian troops advanced twenty kilometers into Ethiopia and Italian airplanes bombed the Ethiopian cities of Adowa and Adrigrat.[67] Italy argued that this attack was justified since Ethiopia had mobilized its troops. These troops, however, remained thirty kilometers from the frontier and had been mobilized out of fear of an Italian attack.[68]

Both Italy and Ethiopia were parties to the Kellogg-Briand Pact and after the attack the case was referred to the League of Nations. One determination made by a committee of the League of Nations was that Italy was the aggressor. In making this determination, the committee relied on the following: (1) the invasion by Italy was not a spontaneous act but was the result of a deliberate plan; (2) Italy had reserved the right to take any measures that might become necessary weeks before the hostility; and (3) Italy's commander had given the order to attack even though

Ethiopian troops had withdrawn to an area thirty kilometers behind the frontier. Thus, the committee determined that Italy had initiated hostilities without defensive necessity. There was no attack or threat of an attack by the Ethiopian troops.[69] It is also interesting to note that Italy argued that a state was entitled to decide on its own as to when circumstances required it to act in self-defense. This argument was also rejected.[70]

Thus, under the Kellogg-Briand Pact, there has to be an attack or the threat of an attack against a country's territory before a state can act in legitimate self-defense. The fact that Italy's attack was not a sudden attack but a well planned invasion coupled with the fact that the Ethiopian troops had withdrawn to an area thirty kilometers from Italy's territory strongly indicated that there was no "necessity of self-defense, instant, overwhelming, leaving no choice" but to use force. Therefore, the use of force by Italy was illegal.

Charter of the United Nations

The Charter of the United Nations is the document most states would examine today to determine whether Israel had acted properly when it attacked the PLO headquarters in Tunisia. In analyzing this attack, three articles of this Charter must be reviewed - Article 2(3), Article 2(4), and Article 51. In examining these articles, a key consideration is whether the customary law of self-defense has been changed by this Charter.

Article 2(3) of the Charter states: "All members shall settle their international disputes in such a manner that international peace and security, and justice are not endangered." This objective is further clarified by Article 33. Article 33 requires the parties to any dispute which may endanger world peace to settle such disputes by negotiation or similar peaceful means. If they are unable to reach a decision, the matter, in

accordance with Article 37, will be referred to the Security Council for resolution.

Article 2(4) states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The force referred to in this article is generally accepted to mean armed force.[71] The combined meaning of these articles is that armed attacks or the threat of armed attacks will not be used by members of the United Nations to settle any dispute. All disputes will be settled through peaceful means.

Article 51 of the Charter, however, presents the one exception to this prohibition. It states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Therefore, under the Charter nations are still allowed to act in self-defense, but when does this right materialize? The problem centers around the words "if an armed attack occurs."

Some international law scholars have stated that the combined effect of Article 2(4) and Article 51 is to limit this right to the repulsion of an armed attack.[72] This, as will be seen, would severely limit the customary right of self-defense. Professor Brownlie supports this restricted view by a close examination of the Charter and the purpose of the United Nations. He points out that if the right of self-defense was to be unchanged by the Charter, then there was no need to include a provision addressing this matter.[73] It will be remembered that the Kellogg-Briand Pact had no provision addressing self-defense since it was the view of the signatories that this right was an inherent right which was implicit in every treaty. Thus, Professor Brownlie argues that since there is a specific provision relating to this right, then the only logical interpretation is that the provision had to limit the customary law as it related to self-defense.[74] Professor Brownlie also looks at the purpose of the United Nations which is to limit the use of force by its members and concludes, any right of self-defense must be "an exceptional right, a privilege."[75] Therefore, the right to act in self-defense is limited to instances when a country is attacked. In other words, according to another author, the terms "armed attack" means something has happened. Use of force in self-defense against a "threat of force" is thereby prohibited by Article 51.[76]

This restricted view of Article 51 was also succinctly stated by Dr. Nincic when he wrote:

> This means that nothing less than an armed attack shall constitute an act-condition for the exercise of the right of self-defense within the meaning of Article 51 (i.e., "subversion" and "ideological" or "economic aggression" does not warrant armed actions on the basis of Article 51). It further stipulates that the armed attack must precede the exercise of the right of self-defense, that only an armed attack which has "occurred" shall warrant a resort to self-

> defense. This clearly and explicitly rules out the permissibility of any "anticipatory" exercise of the right of self-defense, i.e., resort to armed force "in anticipation of an armed attack."[77]

Under this restrictive view there would be no doubt that Israel was not acting in self-defense when it attacked Tunisia since neither the PLO nor Tunisia had launched an armed attack against Israel. Even the murders in Cyprus were not armed attack against the state of Israel. This is important because according to one author this restrictive view is the one which has been adopted by the Security Council.[78]

The other view, and in the opinion of this writer, the correct view, is that Article 51 did not change customary law as it relates to self-defense. The defenders of this view find support for their position in the words: "[N]othing in the present Charter shall impair the inherent right of individual and collective self-defense."[79] This, they say, indicates that the right of self-defense is a theory which was established under customary international law and Article 51 was enacted to remove any doubt about the ability of the members to exercise this right.[80]

More important, however, is the legislative history. One committee which dealt with the drafting of portions of the United Nations Charter stated "the use of arms in legitimate self-defense remains admitted and unimpaired."[81] Furthermore, the notes of the committee responsible for drafting Article 51 indicates no intention on the part of the committee to limit the right as suggested by the more restricted interpretation.[82]

The restricted view may have had a place in international law a hundred years ago when countries were fighting on horseback and carrying their weapons with them. But as Professors McDougal and Feliciano point out, the weapon systems of this modern age do not allow a country to wait

for the armed attack. If a country today waited until the attack had begun before taking defensive action, that country might no longer be able to respond to the attack.[83]

To illustrate how ridiculous the restricted view is in this day of nuclear weapons, one only has to read one supporter's analysis of when a country could act in a nuclear war. This writer stated:

> [I]f the provisions of Article 51 are carefully examined it would appear that what is necessary to invoke the right of self-defense is an armed attack and not the actual, physical violation of the territories of the State .... [A]s long as it can be proved that the aggressor State with the definite intention of launching an armed attack on a victim member-State has pulled the trigger and thereby taken the last proximate act on its side which is necessary for the commission of the offense of an armed attack, the requirement of Article 51 may be said to have been fulfilled even though physical violation of the territories by the armed forces may as yet have not taken place.[84]

Such an approach is totally illogical in this day of highly sophisticated weapon systems. To wait until the trigger is pulled or the button is pushed may prove to be too late. Article 51 has to be interpreted to encompass the customary law of self-defense as developed in the Caroline case.[85]

The Corfu Channel Case

In the Corfu Channel case, the International Court of Justice decided an issue dealing with authorized methods of self-protection and self-defense under the Charter of the United Nations. On 15 May 1946, British warships passed through the Corfu Channel which was in Albania's

territorial waters. These ships were fired on by Albanian shore batteries. On 22 October 1946 British warships were again passing through the channel when the ships struck mines, resulting in the loss of life and the destruction of property. On 12-13 November 1946 the British, without the consent of the Albanian government, swept the Corfu Channel for mines. These actions resulted in various issues being raised before the International Court of Justice. Albania argued that Britain had violated the sovereignty of Albania by its passage through the Corfu Channel on 22 October 1946, and by the mine sweeping operations of 12-13 November 1946.[86]

The Court determined that Great Britain had a right under International Law to travel through the Corfu Channel and that the purpose of this passage on 22 October 1946, was to affirm this right. Great Britain's exercise of this right by using four warships with the crews at their battle stations ready to return fire if fired upon did not violate the sovereignty of Albania.[87]

As for the mine sweeping operation, Britain defended her actions as a method of self-defense, self-redress, and self-help.[88] The Court rejected these arguments stating:

> Between independent states, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albania Government's complete failure to carry out its duties after the explosions and the dilatory nature of its diplomatic notes are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.[89]

Thus, as one scholor has stated, the Court made a distinction between the forcible exercise of a legal right when one expects that this right might be denied (passage through the Corfu Channel) and the right to forcible redress for a right which has already been denied (mine sweeping of the Channel).[90] This distinction is the key to our analysis since Israel, like Great Britain, violated the territorial sovereignty of a country to obtain redress for the murder of three of its citizens. As Great Britain learned, however, not every right which has been violated authorizes redress by force.[91] To allow such responses would result in world anarchy. That is why forcible assertion of a country's rights should be limited. One exception to this prohibition is self-defense which is still governed today by the principles of necessity and proportionality.

Anticipatory Self-Defense

Customary Law

A state need not wait until there is an actual attack to react. It may react if there is a legitimate threat to its security. In other words, anticipatory self-defense is appropriate under certain circumstances.

The Caroline case, even though discussed earlier, was actually a case involving anticipatory self-defense since the ship was not attacking the British but was transporting personnel and supplies to the Canadian rebels. Thus, the same two principles of necessity and proportionality would apply. However these two principles are applied more rigorously.[92] One writer has stated that this right is limited to situations in which "the expected attack exhibits so high a degree of imminence as to preclude effective resort by the entended victim to non-violent modalities of response."[93] Another writer has stated: "A state may defend itself, by preventive means if in its conscientious judgment necessary, against attack

by another State, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended."[94] Thus, the principle of necessity would require that there be a reasonable apprehension of attack and that all nonviolent means be exhausted prior to use of force in self-defense. Of course, proportionality of the response is the third criteria in this test.[95]

When illustrating the principle of anticipatory self-defense, authors usually describe the British destruction of the French Fleet at Oran in 1940.[96] Germany had completed its invasion of France and the French government had signed an armistice. After the signing, a portion of the French fleet took refuge in the port of Oran. The British were concerned that these ships would come under German control and enhance Germany's ability to invade Great Britain. The British offered the French fleet commander three alternatives: (1) to sail under British control to a British harbor and subsequently join the Royal Navy in the fight against Germany; (2) to sail to a distant port and be demilitarized, or (3) to be sunk by the British Navy. When the first two alternatives were rejected, the French ships were fired upon and sunk or severely damaged. This attack has been approved as a legitimate act of anticipatory self-defense.[97]

A more useful example especially for the majority of incidents in the Middle East today is the sending of American troops into Mexico in the early 1900's to destroy the Mexican "terrorists" who were crossing the Mexican border harassing and killing Americans.[98] The United States had protested the attacks to the Mexican government and had given that government adequate time to solve the problem. When the Mexican government did nothing, the United States declared it was the duty of a government to protect its citizens and stated that under these circumstances, the right of self-defense was superior to the right of territorial sovereignty.[99] In both of these examples, there was a reasonable apprehension that if action was not taken immediately, the

security of the country acting in self-defense would be threatened. Also, peaceful means of resolution were attempted prior to taking military action. Finally, the amount of force used was proportionate.

The theory of anticipatory self-defense has created problems because some countries, under the guise of anticipatory self-defense, have launched aggressive war. For instance, Japan argued anticipatory defense when it attacked the Netherlands' East Indies in 1942.[100] Nazi Germany used the same justification when it attacked Norway in 1940.[101] Germany argued that the purpose of the attack was to forestall an imminent invasion of Norway by the Allies. Captured documents revealed that Germany occupied Norway to provide her bases for attacks against England and France and that these plans were laid long before any Allied plan to occupy Norway.[102]

Thus, anticipatory self-defense has been recognized under customary international law. Any claim, however, must be analyzed carefully to ensure that it is legitimate.

Charter of the United Nations

The two different interpretations of the Charter which were discussed earlier also apply to anticipatory self-defense.[103] The individuals which support the restrictive view contend that Article 51 "absolutely forbids any anticipatory defense."[104] The broader view of Article 51 allows anticipatory self-defense since Article 51 was meant to incorporate the inherent right of self-defense. This would include the right of anticipatory self-defense.[105] The restricted view must be rejected since to support such an interpretation "would protect the aggressor's right to the first blow."[106] Certainly no nation has to await an actual attack before responding defensively and an interpretation which supports this view is not based on sound reasoning considering the capability of today's weapon

systems. As stated by one writer, "[R]ealism, common sense, and the destructive nature of modern weapons demand retention of this customary right . . .".[107]

Two cases since the UN Charter was signed illustrate the principle of anticipatory self-defense. The first case is the Cuban Missile crisis.[108] On 22 October 1962 President John F. Kennedy informed the American public that offensive nuclear weapon sites were being constructed on the island of Cuba. On 24 October 1962 a Naval quarantine of this island was ordered by the President.[109] This proclamation stated in part:

> Any vessel or craft which may be proceeding toward Cuba may be intercepted and may be directed to identify itself, its cargo, equipment and stores, and its ports of call, to stop, to lie to, to submit to visit and search, or to proceed as directed. Any vessel or craft which fails or refuses to respond to or comply with directions shall be subject to being taken into custody. Any vessel or craft which it is believed is en route to Cuba and may be carrying prohibited material or may itself constitute such material shall, wherever possible, be directed to proceed to another destination of its own choice and shall be taken into custody if it fails to obey such directions. All vessels or craft taken into custody shall be sent into a port of the United States for appropriate disposition.[110]

In addition to the quarantine, the matter was, on 23 October 1962, referred to the United Nations Security Council for resolution.[111] The United States and the Soviet Union also exchanged letters through diplomatic channels. Eventually, Chairman Khrushchev agreed that the shipments to Cuba would be stopped and weapon sites would be dismantled.[112] The crisis thus ended peacefully.

The three criteria earlier developed for determining whether a response is legitimate anticipatory self-defense clearly indicates that this was such a case. There was certainly a reasonable apprehension of attack. The missile sites were almost completed and the missiles were enroute to Cuba, a country approximately 100 miles from the United States.[113] Even a few days delay may have made the situation irreversible.[114] Nonviolent means, such as referring the incident to the Security Council and the exchange of diplomatic letters, were employed. Most importantly, the response by the United States was proportionate to the threat. Fighter bombers were not sent to destroy the missile sites. Instead, a Naval quarantine was established around the island of Cuba. The quarantine did not require ships carrying restricted material to be captured if the ship's captain agreed to proceed to a port other than Cuba. This was a reasonable alternative. Furthermore, ships transporting unrestricted items were allowed to proceed to Cuba, in some cases, without being searched.[115]

The Cuban missile crisis is an excellent example of how a country should resolve threats to its security. The United States sought peaceful means to solve the threat and did not overreact. If these peaceful efforts had failed, a military attack destroying the sites would have been justified and in accordance with international law.[116]

The second incident which provides a vehicle for the study of anticipatory self-defense is the Israeli attack on the nuclear reactor in Iraq. On 7 June 1981 Israeli F-15 and F-16 aircraft flew more than a thousand miles, bombed and completely destroyed an Iraqi nuclear reactor. Three Iraqi civilians and one Frenchmen were killed in the attack. Israel defended its position as a legitimate act of anticipatory self-defense.[117]

Application of the principles of anticipatory self-defense, however, undercuts Israel's assertion. The key question is whether there was the threat of attack so imminent as to allow Israel's military response. Lieutenant Colonel Shoham, in his article, points out that there was no question regarding the ability of Iraq to produce atomic weapons at some time in the future. The time in the future, however, ranged from six months to ten years.[118] He further justifies the Israeli attack by arguing that the clear intention of Iraq was to attack Israel once the atomic weapons were produced.[119] Assuming this assumption is correct,[120] any deployment of these weapons would not occur for at least six months and possibly longer. In addition, Iraq is over a 1000 miles from Israel. In short, the imminency of an attack was not present so as to justify this response. The difference between this situation and the Cuban crisis where the missiles could be ready for deployment in days in a country only 100 miles away is obvious.

Israel also argued that for humanitarian reasons the attack had to occur before the radioactive material arrived and the reactor became "hot." If they had waited until after this arrival an attack would have caused the spread of radioactivity over the city of Baghdad causing death or injury to many innocent civilians.[121] The problem with this argument is that it still fails to address the issue of necessity. Until Israel could show an imminency of an attack by Iraq it had no right to bomb this nuclear reactor either before or after arrival of the radioactive material.

Furthermore, Israel had adequate time to present its case to the Security Council.[122] As stated, the Charter of the United Nations requires that peaceful methods be used to settle disputes. The issue is not whether the organization can be successful in solving such disputes. It must be given the opportunity. If other countries launched attacks based on speculation, as Israel did, then world peace is severely threatened. The Security Council recognized this fact when it stated in a resolution

condemning the raid that it was deeply concerned about the danger to international peace created by the Israeli attack.[123]

The theory of anticipatory self-defense as developed under customary international law has survived under the Charter of the United Nations. In the past, however, the United Nations has consistently failed to recognize this right, because of the danger associated with the abuse of this principle.[124] Regardless of the past practice, if a crisis develops, such as the Cuban missile crisis, which indicates that a nation is preparing for an attack and the target state has exhaused all peaceful means to resolve the problem, a proportionate attack by the target state to remove the threat would not, in the opinion of this writer, be condemned by the Security Council. To condemn the attack would be tacit approval of a duty to await the "first blow." No one can logically argue that the Charter of the United Nations requires this to occur before a nation can respond defensively.

Analysis of the Israeli Attack

This article, thus far, has developed the right of self-defense and anticipatory self-defense as applied under customary international law, the Kellogg-Briand Pact[125] and the Charter of the United Nations. The question now is whether Israel's attack was a legitimate exercise of either of these rights. If so then the violation of Tunisia's territorial integrity would be justified as a legitimate act of self-defense.

As discussed, in order for a country to act in self-defense the threat must be immediate, leaving no other choice and no time for deliberation. Israel waited until 1 October 1985, six days after the Israeli citizens had been murdered, to launch its attack. During this six-day period, elaborate plans were developed concerning the military response. Unfortunately no considerations were given to peaceful resolution of the problem. Also of importance is the fact that the three men responsible for the murder had

been captured and were awaiting trial in a Cypriot jail. Thus the immediacy of any threat to the state of Israel is undercut by the capture of the terrorists and by the fact that Israel was able to wait six days before responding.

The Italian attack on the troops of Ethiopia which was condemned by the League of Nations[126] provides an excellent tool for analyzing Israel's attack on the PLO and Tunisia. Israel's response, like that of Italy, was well planned and not a sudden response to an immediate threat. Of greater importance is the fact that the Israeli order to attack was given even though the PLO headquarters was 1500 miles from the state of Israel. Italy had been condemned for attacking Ethiopian troops which had been moved to an area only thirty kilometers from the border of Somaliland. These facts clearly indicate that Israel had no fear of an immediate threat to its security and thus there was a lack of defensive necessity which would justify this attack by Israel.

A more helpful way to review the legitimacy of this attack is through the four prerequisites for legitimate self-defense or anticipatory self-defense which have been developed by international law scholars and through state practice. These four points are:

(1) an infringement or threatened infringement of the territorial integrity or political independence of the defending state;

(2) the failure or inability of the other state to prevent this infringement;

(3) the absence of alternative means to secure protection;

(4) the strict limitation of the defending state's use of force to prevent the danger.[127]

As discussed earlier, the PLO headquarters was over a thousand miles from Israel. The people located at this site posed no immediate threat to the territorial integrity of Israel. Israel, however, stated that the purpose of the attack was "to deliver a blow to the headquarters of those who make the decisions, plan, and carry out the terrorist actions."[128] The problem with this is that there is no solid evidence that the PLO was responsible for the murder of the three Israelis. One of the gunmen told reporters that they belonged to no organization.[129] The Cypriot police investigating the killings stated that there was no evidence that the PLO was involved.[130] Israel's own military experts have admitted that the majority of the attacks inside Israel and the occupied territories have been committed by individuals acting alone and not under the direction of the PLO.[131] Before the Security Council of the United Nations, Israel claimed that it had irrefutable evidence to establish this connection.[132] But none has been produced. As with the attack on the nuclear reactor, the Israelis launched an attack based upon speculation. This is insufficient to justify the use of force in anticipatory self-defense.

Even if the PLO is a threat to the security of Israel this does not give Israel the right to violate the territorial integrity of the friendly nation of Tunisia. Certainly, under principles adopted by the United Nations a state has a duty to prevent organized terrorist groups from operating within its territory.[133] However, in this case Tunisia, at the urging of the United States, allowed the PLO headquarters to be located within its borders.[134] This friendly gesture on the part of Tunisia arguably prevented infringements of Israel's territory and saved numerous lives by removing the PLO from Lebanon. Israel should be thankful and not hostile. In addition, Israel apparently never contacted the government of Tunisia in an attempt to peacefully resolve the problem. Thus, there was no exhaustion by Israel of possible pacific means of settling the dispute.[135]

There is also a question as to whether Israel truly believed that Force 17, which was allegedly responsible for the murders, was quartered in Tunisia. On 4 September 1985, approximately three weeks before the murders in Cyprus, Israel's representative to the United Nations had stated to the Security Council that Force 17 and its leaders were in Jordan and that another group of terrorists were in Algeria enroute to Israel.[136] These facts, coupled with the denial by the PLO of involvement and the findings of the Cypriot police that there was no evidence of PLO complicity in the killings, cast considerable doubt on whether the terrorist missions were launched from Tunisia as contended by Israel. One has to wonder if the decision to attack the PLO headquarters in Tunisia was reached because the individuals located there were in some way responsible for the killings or because the friendly nation of Tunisia was a safer target for Israel's military. Israel had considered attacking Algeria but, because of the anti-aircraft defenses located in that country, rejected this alternative.[137] If the safety of the attacking force was the primary reason for the target selection and not because the PLO located in Tunisia was responsible for the Larnaca murders, then the condemnation of Israel was truly justified.

Furthermore, the terrorists responsible for the killings were captured and were to be tried for murder by the Cyprus government. A trial of terrorists provides an alternative that will better protect the security of Israel since it insures that the guilty parties, through incarceration or legal executions, are prevented from committing similar acts in the future. Indiscriminate killing of men, women, and children not only does not ensure that the guilty parties will be eliminated, it also decreases the security of Israel and her citizens by causing the family members of those innocently killed to seek revenge for their deaths. Thus, the cycle of killing continues.

Assuming that the first three requirements were met, satisfying the necessity requirement, it still must be determined whether the force

employed was limited to what was necessary to remove the threat. In other words, was the attack proportionate to the threat? Since this requirement applies not only to self-defense, but also to reprisals, the next topic, its application will be discussed later in this article. Clearly, however, the Israeli attack was not necessary to protect its territorial integrity and was thus not a legitimate act of self-defense.

Reprisals

If the response by Israel was not a lawful defensive action, the next question is whether the attack was a lawful reprisal. Prior to considering this argument it is important to understand the differences between self-defense and reprisals. Self-defense is future-oriented and seeks to protect a state against attacks and threats to its sovereignty, whereas reprisals are past-oriented and seek to punish for past wrongs.[138] Another distinction is that self-defense entails immediate action to protect the state against an attack or imminent threat. Reprisals, however, are taken after deliberation and seek to punish.[139] It is also possible for what could have been a lawful act of self-defense to become a reprisal. As stated by the Mexican delegate to the United Nations: "For the use of force in self-defense to be permissible . . . such force must . . . . be immediately subsequent to and proportional to the armed attack to which it was an answer. If excessively delayed or excessively severe it ceased to be self-defense and became a reprisal . . . ."[140] Therefore, reprisals are taken during a different time frame and have a totally different purpose.

Customary Law

For centuries reprisals were specifically authorized. For instance, in ancient Athens there was a law that allowed the relatives of an Athenian murdered by a foreign national to seize three citizens from the foreign national's state and bring them before an Athenian court if the foreign

state refused to punish or extradite the murderers.[141] Also, until the end of the eighteenth century, states could grant 'Letters of Marque' to its citizens. These documents allowed the citizens to obtain self-help from a state for wrongs done by that state or its citizens.[142]

Under customary international law, however, the Naulilaa incident has generally been regarded as establishing and limiting the criteria for lawful reprisals.[143] In October 1914, a party of Germans from German South-West Africa entered Portuguese African territory. Because of a misunderstanding due to the incompetence of a German interpreter, a skirmish began which ended in the death of three Germans. As a reprisal, German troops were sent into Portuguese territory. These troops attacked the fort of Naulilaa and defeated the Portuguese defenders causing them to retreat. The retreat of the Portuguese from this area allowed the natives to riot. Thus in 1915 the Portuguese had to send in additional troops to subdue the rioting and recapture the territory. Germany defended its action as a legitimate reprisal.[144] The arbitrators who heard the case rejected the Germans' pleas and established three criteria for lawful reprisals. These are: (1) "the existence of a previous act contrary to international law;"[145] (2) the unsuccessful demand for redress prior to taking the reprisal; (3) the proportionality of the reprisal to the act which generated the response.[146] As to the first criteria, acts are contrary to international law if there is a violation of: "(1) an international convention recognized by the opposing states; (2) a customary rule of international law applicable to the states involved; (3) a principle recognized by civilized nations; (4) a decision of an international tribunal to which both states were consenting parties; or (5) a bilateral treaty binding on both states."[147]

Kellogg-Briand Pact

Under the Kellogg-Briand Pact and apparently under the Covenant of the League of Nations, the resort to armed reprisals was illegal. The

signatories of the Kellogg-Briand pact consented to settle all conflicts, of whatever nature, by pacific means.[148] This Pact further condemned the use of military power as a means of solving international controversies.[149] Article XII of the Convenant to the League of Nations required the members to submit any dispute which might escalate into an armed conflict to arbitration, judicial settlement or the Council prior to taking military action.[150] For instance, in 1932, Italy bombed and occupied Corfu. The Italians declared that their actions were a legal reprisal for the killing of an Italian general by Greek extremists. The General was chairman of the Greek-Albanian boundary commission at the time of his murder.[151] Even though the jurists who decided the issue were unable to reach a consensus, the majority concluded that "reprisals taken without prior recourse to pacific settlement were in violation of the Convenant."[152]

Charter of the United Nations

Unlike the differing views as to the right of self-defense under the Charter, there can be little doubt or question that resprisals are strictly prohibited by the Charter of the United Nations.[153]

Even though this prohibition is not specifically stated in the Charter,[154] a reading of the Charter would certainly tend to support this conclusion. The Preamble states that armed force will not be used except for the common interests of the members. Article 2(3) requires that members settle their disputes by peaceful means. Article 2(4) prohibits the members from using the threat or use of force in any manner inconsistent with the purposes of the United Nations. One of the purposes, as outlined in Article 1, is to remove threats to peace and to settle all international disputes by peaceful means. Thus the only logical conclusion is that armed reprisals are prohibited.[155]

A resolution passed by the United Nations has removed any doubt as to the position of the United Nations. On 24 October 1970 a resolution entitled Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States In Accordance with the Charter of the United Nations was passed. This document specifically states that "States have a duty to refrain from acts of reprisal involving the use of force."[156]

In addition, cases decided by the Security Council have supported this prohibition. In case after case, the Security Council has condemned the state of Israel for actions which were considered illegal reprisals.[157] Britain also was condemned for its attack on Yemen in 1964 since it was viewed as a reprisal.[158] Thus there would appear to be no question that the reprisals are illegal under the Charter of the United Nations. Furthermore, because of the numerous resolutions by both the General Assembly and the Security Council which condemn reprisals, such responses by a state would now be considered a violation of customary international law.[159]

New Approach

Regardless of the apparent unambiguous words of the Charter and the decisions of the Security Council some international law writers have suggested that reprisals should be authorized or at least not condemned by the Security Council when certain criteria are met. Since each of these theories deal with reprisals against terrorism, it is important to examine each theory.

Professor Falk, in his article,[160] points out that a state such as Israel which is continuously targeted by terrorists has no way to effectively deal with this problem under present international law.[161] If the state does nothing, the terrorists gain strength while the security of the state

decreases. If the target state takes armed reprisals against the terrorists its actions are viewed as acts of aggression.[162] The United Nations in his opinion is unable to deal effectively with the problem.[163] Likewise, the traditional criteria for taking legal reprisals is too restrictive since it does not assess claims based on what is reasonable under all the circumstances.[164] Professor Falk, therefore, outlined the following twelve points to evaluate the legality of a reprisal against terrorist activity:

> (1) That the burden of persuasion is upon the government that initiates the use of force across international boundaries;
>
> (2) That the governmental user of force will demonstrate its defensive character convincingly by connecting the use of force to the protection of territorial integrity, national security, or political independence;
>
> (3) That a genuine and substantial link exists between the prior commission of provocative acts and the resultant claim to be acting in retaliation;
>
> (4) That a diligent effort be made to obtain satisfaction by persuasion and pacific means over a reasonable period, including recourse to international organizations.
>
> (5) That the use of force is proportional to the provocation and calculated to avoid its repetition in the future, and that every precaution be taken to avoid excessive damage and unnecessary loss of life, especially with respect to innocent citizens;
>
> (6) That the retaliatory force is directed primarily against military and paramilitary targets and against military personnel.

(7) That the user of force make a prompt and serious explanation of its conduct before the relevant organ(s) of community review and seek vindication therefrom of its course of action;

(8) That the use of force amounts to a clear message of communication to the target government so that the contours of what constituted the unacceptable provocation are clearly conveyed;

(9) That the user of force cannot achieve its retaliatory purposes by acting within its own territorial domain and thus cannot avoid interference with the sovereign prerogatives of a foreign state;

(10) That the user of force seek a pacific settlement to the underlying dispute on terms that appear to be just and sensitive to the interest of its adversary;

(11) That the pattern of conduct of which the retaliatory use of force is an instance exhibits deference to considerations (1)-(10); and that a disposition to accord respect to the will of the international community be evident;

(12) That the appraisal of the retaliatory use of force take account of the duration and quality of support, if any, that the target government has given to terrorist enterprises.[165]

Professor Bowett has also published an article which discusses reprisal in the modern context.[166] He opines that reprisals should be broken down into those that are reasonable and those that are unreasonable. If a

reprisal is determined to be reasonable under the criteria which he has developed, then the Security Council is less likely to condemn the attack.[167] A lack of condemnation would indicate tacit approval of reprisals by the Council.

The first criteria outlined by Bowett is to determine if the reprisal is disproportionate to the attack which brought about the need for the reprisal. He illustrates this point by examining two cases. In March, 1954, terrorists from Jordan attacked an Israeli bus killing eleven people. Israel then attacked a Jordanian village killing nine and wounding fourteen. The attack by Israel was clearly a reprisal, but the Security Council did not condemn Israel. In March, 1968, however, Israel was strongly condemned for a reprisal action. In this instance, an Israeli bus struck a mine and two adults were killed and several children were injured. As a reprisal, the Israelis conducted a large-scale attack employing tanks, helicopters, and aircraft. One hundred and fifty terrorists were allegedly killed.[168] This was clearly disproportionate and thereby the attack was condemned.

Additional questions which need to be answered in determining whether a reprisal is reasonable is whether civilians were killed - if so, the attack will more likely, though not necessarily, be condemned. Also was only property destroyed by the reprisal? Did the nation taking the reprisal action provoke the initial attack? Did the reprisal jeopardize the chances for a peaceful settlement? Lastly, what practical methods had the State taken within its own territory to defend against such attacks?[169]

Other articles have been published which likewise call for the authorization of reprisals.[170] Furthermore, this method for dealing with terrorists has not been strictly limited to the academic world. Secretary of State George Shultz has recently endorsed the use of reprisals when he stated that military troops should be utilized to "strike back at terrorists."[171]

This resort to reprisals has not, however, been universally accepted as a legitimate response to terrorism. As for Secretary of State Shultz' remarks, Professor Edith Brown Weiss of Georgetown University labelled his statements as "a new theory" which "came close to suspending international law for terrorism."[172] Professors Taulbee and Anderson have condemned the use of reprisals and have upheld the Charter as the means of dealing with this problem.[173] According to these authors:

> The seeming disorder of contemporary life should not diminish the vision of the Charter. We fail to see the positive gains of retreating from the formulatons of the Charter. Conversely, we should note that legitimizing force as a means of retaliation might be giving normative blessing to political chaos.[174]

Prime Minister Margaret Thatcher of Great Britain apparently agrees with them since she recently stated that retaliation could cause greater chaos.[175]

Thus, there is clearly no consensus of opinion, either among international scholars or world leaders, as to whether reprisals are appropriate when dealing with terrorism. There is no doubt that terrorism is on the increase and that the United Nations has been unable to successfully deal with the problem. The writers discussed above have provided a reasonable framework for dealing with this problem. However, such a framework does not authorize nations to completely disregard the Charter of the United Nations and to take actions which jeopardize world peace. The question becomes whether the actions of Israel can be justified as a reasonable reprisal under any of the theories discussed above.

Analysis of Israel's Reprisal

Reprisals have been defined as "retaliation for a wrong previously done."[176] Based upon this definition, there can be little doubt that Israel's attack on the PLO Headquarters could be classified as a reprisal. Thus under the United Nations Charter and Resolution 2625, the actions of Israel were illegal and properly condemned by the Security Council. However, under customary international law and under a theory of reasonable reprisals, such actions may be justified and legitimate. Our analysis must therefore include an examination of each of these theories.

Under customary international law, three criteria were discussed, each of which must be met in order for a reprisal to be legitimate.[177] The first is a previous act contrary to international law. Terrorism is the unlawful use of force to further political objectives. It is intended as a means to force a government to modify its policies.[178] The murder of three innocent civilians in an attempt to obtain the release of Palestinians held by Israel would thus qualify as a terrorist act. Furthermore, such murders violate principles recognized by civilized nations. As such, this terrorist act violated international law. The second criteria, seeking redress prior to taking the reprisal, was neither accomplished nor even attempted by the State of Israel. One writer has opined that this requirement no longer applies to Israel since in the past it has proven futile for Israel to resort to the Security Council.[179] This view must be rejected. Regardless of past failures, peaceful solutions should always be attempted prior to taking military actions. This is especially true when there is a possibility that innocent civilians will be killed. Thus, Israel's attack was not justified under customary international law. This conclusion is supported by the fact that Italy, as was earlier discussed, was condemned for not seeking redress prior to bombing Corfu as a reprisal for the killing of an Italian general by Greek extremists.[180] Furthermore, when Israel invaded Lebanon in 1982 one justification for this attack was the attempted

assassination of Israel's Ambassador to Great Britain by Palestinians. This reason for the attack was viewed as a reprisal and was determined to be illegitmate since pacific redress was not sought prior to the invasion.[181]

An examination of Professor Falk's twelve points also reveals that Israel's response was not a justified reprisal. Israel's actions violated at least eight of his points. Therefore, the first point cannot be met, because Israel cannot carry its burden of persuasion. Secondly, Israel cannot convincingly demonstrate that the use of force was for the protection of its territorial integrity, national security, or political independence. The PLO denied responsibility. The three terrorists stated they belonged to no organization, and the Cypriot police uncovered no connection between the murders and the PLO. It is impossible for the Israelis to carry convincingly its burden under this prerequisite. For the same reasons, the Israelis cannot establish a "genuine and substantial link" between the terrorists and the PLO. As earlier indicated, Israel made no effort at using pacific means to obtain satisfaction - a requirement of point four. The proportionality of the attack will be discussed later,[182] but attacking a headquarters located in a residential area[183] does not indicate that every precaution was taken to avoid an excessive loss of life among innocent civilians. This is a requirement of point six. For the same reasons, even though military and paramilitary targets were surely the object of the attack, it is hard to achieve this objective and not bring destruction to the civilian community when the attack occurs in a residential community. Lastly, there is no evidence that Tunisia had given any support to the PLO. Thus any retaliatory use of force against this country was clearly unjustified. Therefore, points seven and twelve were not satisfied.

Under Bowett's test, the Israeli attack, in addition to the question of proportionality,[184] is unreasonable for two reasons. First, many innocent civilians were killed. Secondly, on 27 September 1985, King Hussein of Jordan, in a speech before the United Nations General Assembly, offered to

enter into direct negotiations with Israel concerning peace in the Middle East. Some Israeli leaders urged that this opportunity for a peaceful solution be seized. Israel, however, rejected this offer.[185] World leaders expressed the belief that this attack hurt any change for further peace talks.[186] Reprisals which jeopardize efforts for a peaceful solution to a crisis are considered unreasonable under Bowett's analysis.

The action of Israel, therefore, cannot be justified as a legitimate and lawful reprisal under any of the theories which have been discussed.

Proportionality

Since Israel failed to meet the necessary requirements of self-defense, anticipatory self-defense, and reprisals, there is legally no need to discuss the proportionality of Israel's attack. However, in order to completely evaluate this attack, it is important that this requirement be examined.

The last prerequiste in any discussion of each of these theories is whether the attack was proportionate to the force or threat of force, which brought on the need for a defensive action or response. A comparison of the lives lost, the property destroyed, and the means utilized quickly makes one realize that Israel's response was totally disproportionate to any threat or to any provocation caused by the murders. Three Israelis were killed compared to over fifty killed and 100 wounded PLO members and innocent Tunisian citizens.[187] This latter group posed no threat to Israel. Further, the State of Israel suffered no property damage whereas there was considerable damage in Tunisia. Lastly, the three gunmen attacked the three Israelis in Cyprus with AK 47's and grenades. Israel responded with fighter bombers.

What is even worse is that Israel realized, based on past practice, that this attack was totally disproportionate. As was discussed earlier, Israel was condemned in 1968 for responding to a bombing which killed two adults and wounded several children by attacking Karameh with tanks, aircraft, and helicopters, and killing over one hundred and fifty individuals.[188] This indicates that Israel has no intention of respecting the will of the international community.[189]

Israel attempts to justify such attacks by arguing that the rule of proportionality should be based on the aggregate of past acts and not by looking solely at the preceeding attack.[190] Such an application of the rule of proportionality may prove to be not only unrealistic but catastrophic to world peace.

Self-defense is authorized as a means to protect a state and its citizens from the armed attack or threat of an attack by another nation. Reprisals are allowed in order to punish for past violations of international law. If by not responding immediately to a threat or provocation, but waiting and allowing several small aggressive acts to occur before the target country takes a large scale miltary action, the question becomes not only one of proportionality, but also of necessity. For example, if a band of terrorists launched on three different occasions, raids into Israel from a small town in Lebanon but then departed, could Israel legitimately take defensive action against this town? This answer is no. The town no longer poses a threat to the territorial integrity of Israel. Therefore, there is no defensive necessity. Similarly, a reprisal would be inappropriate since there is no longer a substantial link between the town and the prior acts of provocation. The terrorists have left.

Secondly, the Israeli theory of proportionality would make the application of this rule impossible. In the past year, approximately sixteen Israeli men and women have been murdered by Palestinians.[191] Since the

Israeli attack resulted in the death of approximately forty-five Palestinians, was this attack disproportionate or can the Israelis add in murders from past years and/or deaths from combat to show that the attack was proportionate? Even though this rule should never be interpreted so as to require a one-for-one exchange of killings, a workable standard must be established. This can only be accomplished by looking at the immediate threat, attack or provocation.[192] Only then can the world measure the true proportionality of the defensive response or reprisal.

Lastly, the eventual Israeli response can be considerably greater in scope under Israel's aggregate theory of proportionality.[193] The greater the scope of the attack, the greater the chance that world peace will be threatened since large scale military attacks create the possibility that other nations will become involved, thus escalating the crisis. It is doubtful that a nation will go to war over the death of a few of its citizens. But, destroy a residential area and the odds drastically increase. Therefore, the Israeli approach is not only unworkable, but extremely dangerous.

In discussing proportionality, it is also important to discuss the effect that the death of civilians has on the application of this rule. Bowett stated that if civilians are killed then this fact alone may bring condemnation from the Security Council.[194] A rigid application of this rule is totally unworkable. The death of civilians, although not planned or desired, is, in many cases, an unavoidable consequence. If the defensive action or reprisal is otherwise legitimate then the unfortunate death of civilians should not dictate automatic condemnation of the attack. A better way to approach this problem is by applying the traditional doctrine of 'double effect'. This doctrine allows action to be taken even if there is the possibility of civilian deaths as long as four requirements are met. The most important requirement for this discussion is the following:

> The intention of the action is good, that is he aims narrowly at the acceptable effect; the evil effort is not one of his ends, nor is it a means to his ends, and aware of the evil involved, he seeks to minimize it, accepting costs to himself.[195]

An example given to illustrate this point is the use of commando raids in Norway by the British during World War II instead of bombing raids in order to spare the lives of civilians.[196]

The intention of the Israelis, to punish the PLO for their terror tactics, was good. Also, no one can honestly contend nor are there any facts to substantiate that the Israelis intended to kill any civilians.[197] The problem with the Israeli attack is that it did not seek to minimize the evil by accepting increased danger to its armed forces. Other types of military action, such as commando raid, would have decreased the chance of civilian deaths.[198] In making this statement, it is realized that the Israeli pilots were apparently very accurate in their bombing runs since a hospital was not hit even though it was in the immediate area of the attack.[199] It is felt, however, that an air attack in a residential area in which civilians of a friendly nation are living is creating too much of a danger that the innocent will be wounded or killed and thus alternative methods or targets should have been found.

Protocol I to the Geneva Convention of 12 August 1949 even though not signed by Israel, has been signed by sixty-two nations.[200] It therefore provides helpful guidance in assessing the Israeli attack and the resulting civilian deaths. Article 51 of this Protocol[201] not only prohibits reprisal against civilians, it also prohibits indiscriminate attacks. An indiscriminate attack is one which employs a method of combat which cannot be directed at specific military targets and consequently strikes both military and civilian objects.[202] "An attack which may be expected to cause incidental

loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated" is per se an indiscriminate attack.[203]

As stated before, a raid with fighter bombers on a residential community could certainly be expected to cause incidental loss of civilian lives. Therefore, the Israeli attack was indiscriminate and thereby disproportionate.

It is obvious, therefore, that the attack by Israel was totally disproportionate to the murders which led to the bombing of the PLO headquarters. It is exactly this type of indiscriminate action which prevents any peaceful resolution of the problems in the Middle East. The men who committed this terrorist act had been apprehended and will hopefully be punished. Considering these facts, an attack of the magnitude which Israel launched not only against the PLO headquarters but against the friendly nation of Tunisia was excessive under international law.

Aggression

If the actions of Israel were not defensive and were not a lawful reprisal, the remaining question is whether they can be labelled as illegal acts of aggression. The Security Council in condemning the attack classified it as "armed aggression perpetrated by Israel against the Tunisian territory" and adopted a resolution demanding that Israel "refrain from such acts of aggression."[204]

The General Assembly has passed a resolution defining aggression as "the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations . . . ."[205] This definition is extremely broad. One must turn to Articles 2 and 3 of the

Resolution to find specific guidance as to what constitutes aggression. Article 2 states that the first use of armed force in contravention of the Charter of the United Nations is prima facie evidence of aggression.[206] Article 3 contains a nonexhaustive list of acts which would qualify as aggression. Two of these acts are (1) the invasion or attack of another State's territory and (2) the bombardment or the use of any weapons against another State. Article 6 qualifies this prohibition by allowing lawful uses of armed force if authorized by the Charter.[207] Therefore, the right to act in self-defense has not been denounced by this resolution. Whether anticipatory self-defense has been forbidden is uncertain because it requires the first use of force and thus would violate Article 2. Under the broader interpretation of Article 51, however, anticipatory self-defense would be a lawful use of force, and therefore, not denounced by this definition.

Reprisals would qualify as acts of aggression under this resolution. By referring to the Provisions of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among the States in its resolution on aggression, the General Assembly made it clear that reprisals, which were specifically prohibited by this declaration, would be condemned as acts of aggression. The only exception to such a determination would be if the Security Council determined, in accordance with Article 2, that under all the relevant circumstances the reprisal was justified. Here, reference to Professors Falk and Bowett's articles[208] would be important in attempting to argue the legitimacy of the reprisal.

The actions of Israel, as has been determined, did not qualify under any of the possible lawful uses of force. In addition, her actions clearly fall within the first two prohibitions of Article 3 of the Resolution defining aggression. Furthermore, Article 5 states that there is no justification for an act of aggression and labels aggression as a crime against international peace.[209] Israel, therefore, cannot rely on past acts of terrorism to justify

its raid on Tunisia. The Security Council was thus correct in labelling Israel's acts illegal aggression.

Future Reaction to Terrorism

The conclusion that Israel's attack on Tunisia was an act of aggression was based upon the interpretation of past cases, the Kellogg-Briand Pact, the Charter of the United Nations, and customary international law. Recently, Professor W. Michael Reisman has suggested that incidents which occur in the international arena should be considered and studied to determine the present status of international law.[210] Under his proposal, a student would study the reaction of world leaders to an incident and determine what was presently justified and/or tolerable behavior under international law. He compared his approach to the study of appellate cases by domestic lawyers so they could predict the direction of the law and thus properly advise their clients.[211] According to Professor Reisman, international lawyers would prove to be more valuable to world leaders if this approach was adopted.[212] Such an approach seems totally reasonable and logical. Therefore, world reaction, as expressed before the Security Council, will be reviewed to determine why the Israeli raid was condemned as an act of aggression.

Earlier in this article, the facts and the norms of behavior required under international law as expressed in treaties and under customary international law were discussed. They will not be outlined again.[213] However, it is important to describe the claims of the parties, Tunisia and Israel, before the Security Council.

The position of Tunisia, as expressed by her Minister of Foreign Affairs, was that the "raid constitute[d] a blatant act of aggression against the territorial integrity, sovereignty, and independence of Tunisia and a flagrant violation of the rules and norms of international law, as well as the

principles set forth in the United Nations Charter."[214] The Foreign Minister also stated that no acts of terrorism had been committed from Tunisia and that Tunisia had never been involved in any acts of terrorism. Tunisia requested that the acts of Israel be condemned by the Security Council and that reparation for damages be assessed.[215]

The representative of Israel, Mr. Netanyahu, vigorously defended the actions of his country as acts of self-defense and a legitimate response to terrorism.[216] He accused the country of Tunisia of knowingly allowing the PLO the freedom to plan, train, and organize terrorist attacks from its territory. Mr. Netanyahu stated that terrorism was threatening the entire world and if the United Nations was truly committed to eliminating terrorism it would begin by ridding itself of the PLO.[217] The lines were thus clearly drawn for the Security Council to assess the attack by Israel.

Every country which spoke before the Security Council with the exception of the United States, strongly condemned the actions of Israel.[218] Of course, condemnation of Israel is expected from certain countries of the world. Other countries, however, from which strong condemnation is less expected, joined this total rebuke of Israel. To realize the force of this condemnation it is important to review what was stated by various nations. In determining which statements to review some countries were chosen which have been the target of terrorist attacks.[219] Strong condemnation from these countries give a clearer and less tainted appraisal of world reaction to this attack.

France

France condemned the use of force against the territorial integrity of any state, stating that "such an operation constitutes an inadmissible violation of the rules of international law."[220] Its representative further denounced the violence which had killed innocent victims. Lastly, concern

was expressed over the effect the attack would have on the resumption of the peace process.[221]

United Kingdom

The representative of the United Kingdom stated that after listening to Israel's explanation and studying the facts, the conclusion of his country was "that there can be no question but that the raid constitutes a serious violation of the Tunisian sovereignty and that it has been the cause of the indiscriminate killing and wounding of many innocent civilians."[222] He further questioned the validity of the accusations against the PLO for the killing of the Israelis in Cyprus, and concluded that even if the PLO was responsible, Israel did not have the right to retaliate against Tunisia. This representative also was concerned about the effect the attack would have on the present peace process.[223]

China

The Peoples Republic of China issued the following statement concerning the raid:

> This is a serious crime committed by the Israeli authorities against the Palestinian and other Arab peoples. It constitutes a wanton encroachment upon the independence, sovereignty and territorial integrity of the Republic of Tunisia and a gross violation of the principles of international law and the United Nations Charter."[224]

The Chinese representative also commented on the grave loss of life suffered by the Tunisian people.[225]

Greece

Greece condemned the armed violation of the territory of the Republic of Tunisia and also expressed concern that this attack occurred at a time when efforts were being made to secure peace.[226]

Jordan

Jordan condemned the attack as a violation of Tunisian sovereignty. Jordan placed special emphasis on the fact that it was Tunisia that welcomed the PLO from Beirut under international agreements. It also accused Israel of attempting to sabotage the peace process at a time when the process was again moving.[227]

Egypt

This country also condemned the aggression by Israel against another state. Egypt further stated that actions of Israel were committed to undermine the peace process.[228]

Denmark

Even though Denmark condemned the acts of terrorism committed against Israel, it also condemned the Israeli attack as a violation of the sovereignty and territorial integrity of Tunisia. The terrorist attacks against Israel did not justify such actions against Tunisia.[229]

United States

The United States initially stated that the Israeli raid was a "legitimate raid" and "an expression of self-defense."[230] Later the White House called the raid an expression of self-defense but said the bombing could not be condoned.[231]

In total, more than thirty individuals representing countries throughout the world spoke before the Security Council. Each, without hesitation and in the strongest words, condemned the Israeli attack. Fourteen members of the Security Council voted in favor of a resolution condemning Israel. The United States abstained.[232]

In analyzing the incident, it is interesting to note that the degree of condemnation experienced by Israel was probably greater than Israel ever imagined. This can be gleaned from the following statement which was made by Israel's representative at the United Nations:

> We had expected, perhaps from an incurable faith in human logic and decency, that the victims of terrorism would be the first to applaud the defensive action taken by Israel against the nerve centre of world terrorism and indiscriminate murder. Instead, we listen with amazement to the incredible criticism and even denunciation of Israel's action . . . .[233]

The degree and unanimity of the condemnation must not be interpreted, however, as an indication that the nations of the world disfavor all attacks against terrorist headquarters.

Each of the nations identified above had two and sometimes three reasons for opposing the raid by Israel. One was that it violated the territorial integrity of a sovereign, peaceful, friendly nation. Second was the fact that innocent civilians were killed and third, the raid occurred shortly after Jordan had presented to the General Assembly a new peace plan for the Middle East. Israel recognized that the first two points were the main reasons its attack was being condemned and attempted to justify both the breach of Tunisian territorial integrity and the lack of proportionality of the raid.[234] As can be seen from the vote on the resolution condemning the attack, this attempt was unsuccessful.

This analysis of the incident enables one to predict, with some degree of certainty, that attacks which violate territorial sovereignty and kill innocent civilians will be condemned. However, an attack against a nation which houses and trains terrorists by a State which has been the target of terrorist attacks will probably be received with favor by the Security Counsel if mainly terrorists are killed. In short, a state must carefully choose when, where, and how it will launch such attacks and cannot indiscriminately attack other nations and kill innocent civilians. Israel failed to follow this rule and was therefore justifiably condemned by the Security Council.

Conclusion

How to deal with terrorism is one of the most serious problems facing the world today. On 8 October 1985 the Secretary General of the United Nations condemned all acts of terrorism.[235] This was followed by a similar condemnation by the President of the Security Council on 9 October 1985.[236] On 9 December 1985, the General Assembly passed a resolution condemning terrorist acts as criminal and called upon all states to refrain from assisting terrorist acts and to cooperate in the elimination of terrorism.[237] On 18 December 1985 a resolution was adopted by the Security Council condemning "unequivocally all acts of hostage-taking and abduction;" and calling "for the immediate safe release of all hostages and abducted persons . . . ."[238] It also affirmed the obligation of states to seek the release of any hostages held in their territories and to prevent such action in the future.[239]

Words, however, are not going to end the problem. If terrorists continue to kill innocent men, women, and children then nations are going to have to fight back. But raids like the one conducted by Israel are not the answer. When retaliation also kills innocent civilians, the retaliating

state puts itself on the same level as terrorists. The attacks must be such that mainly terrorists are captured or killed. If this is not the case, world condemnation will result.

It is realized that retaliation of the type advocated above would be in violation of the Charter of the United Nations. The articles of the Charter were written, however, at a time when the world was not experiencing terrorist attacks as are occurring now. Even though states should attempt to solve all international problems in a peaceful manner, this will not always be possible when dealing with terrorists. Thus, other methods must be found. Such methods include self-defense, anticipatory self-defense, and reprisals when all other peaceful methods have been exhausted.

Under different circumstances, the Israeli raid would have possibly been praised and not condemned by the nations of the world. At least, in the opinion of this writer, the condemnation would not have been as strong. A state must do two things before taking such action. First, the state must establish a factual link between the terrorist act and the object of the attack. Mere speculation, as relied on by Israel, is not enough and is sure to bring world condemnation. Secondly, the state must plan the attack and the weapons to be employed so as to minimize the loss of civilian lives. This may result in a greater loss of life to the military forces being utilized to carry out the response. However, the indiscriminate killing of civilians will never be tolerated. It is believed that if Israel had established this factual link and had carried out a commando raid in which only the responsible terrorists were killed, the opinion of the world would have been substantially different. This is true even though the territorial integrity of Tunisia would have been violated by a commando raid.

Recently Secretary of State George Shultz stated that terrorists, unlike freedom fighters, "blow-up busses containing non-combatants;" and "assassinate businessmen, or hijack and hold hostage innocent men, women,

and children."[240] The problem with this statement is that it fails to recognize that those whom some nations call terrorists are labelled freedom fighters by others.[241] If nations do not condemn attacks like the one carried out by Israel how can attacks by terrorists which have the same results and are executed for the same purpose be condemned? The rules must be applied equally. A state cannot praise its allies for actions that bring condemnation when committed by a foe. If this occurs, the killing and the chaos in the Middle East will continue. Furthermore, when a nation lowers itself to the level of the terrorists by committing atrocities on the innocent, then that nation, like the terrorists, loses the respect of the other nations in the world. Nothing is gained if this happens. The condemnation of Israel by the Security Council was totally justified.

ENDNOTES

1. Targetting the PLO, Newsweek, Oct. 14, 1985, at 52.

2. United Nations News Digest, Press Release WS/1253, Oct. 11, 1985.

3. Israel's 1500-Mile Raid, Time, Oct. 14, 1985, at 42; 3 Palestinians Kill 3 Israelis in Cyprus, Later Surrender, Washington Post, Sept. 26, 1986 at A-32.

4. Mr. Reagan's Response to the Tunisian Raid, The Christian Science Monitor, Oct. 8, 1985, at 15.

5. Washington Post, supra note 3.

6. Time, supra note 3, at 43. After the attack an anonymous caller told a news agency that Force 17 was responsible for the killings. Washington Post, supra note 3.

7. Christian Science Monitor, supra note 4. There are many Palestinian Organizations and all do not come under the command of Yasser Arafat.

8. Newsweek, supra note 1, at 53.

9. This distance required the Israeli jets to refuel twice in midair from Israeli tanker planes. Supra note 3, at 42.

10. Time, supra note 3, at 42.

11. Id.

12. Israel's Air Raid Destroys Arafat's Base in Tunisia, The Washington Post, Oct. 2, 1985, at A1, A20; Tunis Asks Security Council to Condemn Israeli Raid, The Washington Post, Oct. 3, 1985 at A32.

13. Tunisia Leader Bitter at the U.S., New York Times, Oct. 3, 1985, at A11.

14. United Nations News Digest, Press Release WS/1252, Oct. 4, 1985; Security Council Debates Air Raid, New York Times, Oct. 3, 1985, at A12.

15. New York Times, supra at note 14.

16. Newsweek, supra note 1, at 52.

17. Israel had the Right to Strike Back at Terrorists, Reagan Says, The Washington Post, Oct. 2, 1985, at A20.

18. New York Times, supra note 13.

19. Time, supra note 3, at 43.

20. White House, in Shifts, Says Raid by Israel 'Cannot be Condoned', New York Times, Oct. 3, 1985, at A-1.

21. U.S. Defends Action in U.N. on Raid, New York Times, Oct. 7, 1985, at A3.

22. New York Times, supra note 20.

23. Time, supra note 3, at 43.

24. Newsweek, supra note 1, at 52.

25. Provisional Verbatim Record of the 2610 Meeting of the Security Council, S/PV.2610 Oct. 2, 1985, at 8.

26. Id. at 11.

27. Provisional Verbatim Record of the 2611 Meeting of the Security Council, S/PV 2611, 2 Oct. 1985 at 82.

28. Id.

29. Id. at 23-24.

30. Id.

31. Provisional Verbatim Record of the 2615 Meeting of the Security Council, S/PV 2615, 4 Oct. 1985, at 108.

32. S/Res/573, Oct. 4, 1985.

33. See Jennings, The Caroline and McLeod Cases, 32 Am. J. Int'l. L. 82 (1938) for a detailed examination of the facts.

34. Id. at 89.

35. McDougal and Feliciano, Law and Minimum Word Public Order, at 217 (1961).

36. Brownlie, International Law and the Use of Force by States, at 42 (1963).

37. Wright, The Meaning of the Pact of Paris, 27 Am. J. Int'l. L. 29, 54 (1933).

38. Id.

39. Brierly, The Law of Nations, at 406 (6th ed. 1963).

40. Brownlie, supra note 36, at 236 (emphasis added).

41. Id. at 239.

42. Brierly, supra note 39.

43. Id.

44. McDougal and Feliciano, supra note 35, at 242.

45. Whiteman, Digest of International Law, V12, at 46 (1971).

46. Id.

47. McDougal and Feliciano, supra note 35, at 243.

48. Levenfeld, Israeli: Counter-Fadayeen Tactics, 21 Colum. J. Trans. Law 1, 41 (1982-83).

49. Brownlie, supra note 36, at 91.

50. Id. at 84.

51. Whiteman, supra note 45, at 52.

52. Id. at 42-43 for a listing of the reservation of various nations concerning the legitimate right of self-defense.

53. Brownlie, supra note 36, at 241.

54. Id.

55. Id.

56. Italo-Ethiopian Commission of Conciliation and Arbitration, 29 Am. J. Int'l. L. 690, 692 (1935).

57. Potter, The Wal Wal Arbitration, 30 Am. J. Int'l. L. 27, 28 (1936).

58. Italo-Ethiopian Commission of Conciliation and Arbitration, supra note 56, at 692.

59. Id. at 696-696.

60. Dispute Between Ethiopia and Italy, Report of the Council of the League of Nations, 30 Am. J. Int'l. L. (Supp.) 1, 3 (1936).

61. Id.

62. Id. at 4.

63. Id. at 7.

64. Id. at 10.

65. Id. at 10-12.

66. Id. at 15.

67. Id. at 38.

68. Id. at 15.

69. Wright, The Test of Aggression in the Italo-Ethiopian War, 30 Am. J. Int'l. L. 45, 53 (1966); Brownlie, supra note 36, at 242-243.

70. Id., at 56; Brownlie, supra note 36, at 242-243.

71. Brierly, supra note 39, at 415.

72. Intoccia, International Legal and Policy Implications of an American Counter-Terrorist Strategy, 14 Den. J. Int'l L. & Pol'y 121, n.64 (1985).

73. Brownlie, supra note 36, at 273.

74. Id.

75. Id.

76. Kunz, Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations, 41 Am. J. Int'l. L. 872, 878 (1947). It is also interesting to note that this author defined armed attack as an illegal armed attack. Therefore, an armed attack authorized defensive actions and the conditions of necessity and proportionality were no longer conditions to this right.

77. McDougal and Feliciano, supra note 35, citing Reply From Dr. Nincic, in Schwarzenberger, Report on Some Aspects of the Principle of Self-

Defense in the Charter of the United Nations and the Topics Covered by the Dubrovnik Resolution 69 (Int. Law Assoc., 1958).

78. Intoccia, supra note 72, at 134.

79. U.N. Charter art. 51.

80. Brierly, supra note 39, at 417.

81. Id.

82. Id.

83. McDougal and Feliciano, supra note 35, at 238-240. This observation was made in 1961 by Professors McDougal and Feliciano. It is even more justified in today's world.

84. McDougal and Feliciano, supra note 35, at 239, citing Singh, The Right of Self-Defense in Relation to the Use of Nuclear Weapons, 5 Indian Yb. of Int. Affairs 3 (1956).

85. The issue of anticipatory self-defense will be discussed, infra.

86. Corfu Channel Case, International Court of Justice, I.C.J. Rep. 1949, at 4; Green, International Law Through the Cases, at 254 (1970).

87. Green, supra note 86, at 265.

88. McDougal and Feliciano, supra note 35, at 226, n.235.

89. Green, supra note 86, at 265.

90. Brierly, supra note 39, at 426.

91. Id., at 426-427.

92. S. Mallison and W. Mallison, Armed Conflict in Lebanon, 1982, Humanitarian Law in a Real World Setting at 16 (1985).

93. McDougal and Feliciano, supra note 35, at 231.

94. Brownlie, supra note 36, at 257, citing Westlake, International Law at 209 (1904).

95. Intoccia lists four preconditions: (1) an impending threat; (2) compelling necessity to react; (3) exhaustion of all peaceful methods; and (4) proportionality of the force to the threat. Intoccia, supra note 51, at 132.

96. Mallison and Mallison, supra note 92 at 17; Mallison and Mallison, The Israeli Aerial Attack on June 7, 1981, Upon the Iraqi Nuclear Reaction: Aggression of Self-Defense? 15 Vand. J. Transnat'l L. 417 (1982); 1 Oppenheim International Law 303 (8th ed. Lauterpacht, 1955); Riggs, The Grenada Intervention: A Legal Analysis, 109 Mil. L. Rev. 1, 59 (1985).

97. Mallison and Mallison, supra note 96, at 422-423. French ships at other locations accepted the less drastic of the British demand and were not attacked.

98. Levenfeld, supra note 48, at 31.

99. Id. at 31-32; 2 G. Hackworth, Digest of International Law at 289, 291 (1941). There is, however, disagreement as to whether sporadic raids

across borders would be considered "armed attack" today as those terms are interpreted under the Charter of the United Nations. Id., at 16.

100. McDougal and Feliciano, supra note 35, at 233.

101. Mallison and Mallison, supra note 96, at 25-26.

102. Nazi Conspiracy and Aggression, Opinion and Judgment, at 34-38 (1947).

103. Supra at 12-15.

104. McDougal and Feliciano, supra note 35, at 233; see also Brownlie, supra note 36, at 275-278.

105. Mallison and Mallison, supra note 96, at 420-421.

106. Shoham, The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense, 109 Mil. L. Rev. 191, 199, citing Waldock, The Regulation of the Use of Force by Individual States in International Law, 81 Hague Recueil 45, 497-98 (1952).

107. MacChesney, Some Comments on the "Quarantine of Cuba, 57 Am. J. Int'l. L. 592 (1963).

108. It is questioned by some writers whether this incident involved self-defense under Article 51 or collective security measures under Article 52. See, Shoham, supra note 106, at 201. It is believed, however, that this incident provides an excellent example of the application of the three criteria of anticipatory self-defense.

109. Mallison, Limited Naval Blockage on Quarantine Interdiction: National and Collective Defense Claims Valid Under International Law, 31 Geo. Wash. L. Rev. 335, 338-339 (1962-1963).

110. Presidential Proclamation No. 3504, 27 Fed. Reg. 10401 (1962). This proclamation is also printed in full in Appendix A of Professor Mallison's article, supra note 108. It is important to note that this proclamation, like the British command to the French Fleet at Oran, gave the commanders of the ships a reasonable alternative to capture, i.e., to proceed to a different destination of their choice.

111. Mallison, supra note 109, at 340.

112. Id., at 342.

113. Shoham, supra note 106, at 203.

114. McDougal, The Soviet-Cuban Quarantine and Self-Defense, 57 Am. J. Int'l L. 597 601-602 (1963).

115. Mallison, supra note 109, at 390.

116. For an opposing view concerning the United States' actions, see Wright, The Cuban Quarantine, 57 Am. J. Int'l. L. 546 (1963). Professor Wright opines that the episode tarnished the United States' reputation as a champion of international law.

117. Shoham, supra note 106, at 191, 204; Mallison and Mallison, supra note 96, at 418.

118. Shoham, supra note 106, at 208-210.

119. Id.

120. See Mallison and Mallison, supra note 96 for the view that there was no significant threat of an attack which would justify Israel's bombing.

121. Shoham, supra note 106, at 221, n.130.

122. See Mallison and Mallison, supra note 96, at 428 for a list of other pacific means that could have been employed by Israel. The United States' condemnation of Israel was based on the fact that peaceful means were not employed to resolve the dispute. 20 International Legal Materials No. 4, at 994 (1981).

123. S. C. Res. 487, 36 U.N. SCOR (1981), U.N. Doc. S/Res/487 (1981).

124. Levenfeld, supra note 48, at 16.

125. The doctrine of anticipatory self-defense was not separately discussed as it was applied under the Kellogg-Briand Pact since customary international law was applied under the treaty.

126. Supra at 10.

127. Levenfeld, supra note 48, at 28.

128. Terrorists Have No Haven From Israel, The Washington Post, Oct. 2, 1985, at A20.

129. Id.

130. Id.

131. The Palestinian-Israel Fight: Arab Lands Now Spectators, New York Times, Oct. 3, 1985, at A1.

132. Provisional Verbatim Record, infra note 216, at 23.

133. G. A. Res. 2625, 25 UN GAOR Supp. 28, at 121; U.N. Doc. A/8028 (1970).

134. New York Times, supra note 20.

135. One of the men who murdered the three Israelis in Cyprus was a British subject. Assuming that the PLO had a group of British supporters living in a neighborhood in London would this have given Israel the right to violate Britian's territorial integrity by militarily attacking this neighborhood and killing innocent British subjects? One can be assured that peaceful and diplomatic means would have been utilized and not military means if such a case developed. The same principles should apply when dealing with Tunisia.

136. Provisional Verbatim Record, supra note 25, at 29-30.

137. Newsweek, supra note 1, at 53.

138. Levenfeld, supra note 48, at 37.

139. Taulbee and Anderson, Reprisal Redux, 16 Case W. Res. 309, 316 (1984).

140. Goodrick, Hambro and Simons, Charter of the United Nations 347, citing GAOR/20th Sess., 6th Ctte/997 Mtg/Dec. 1, 1965, para. 42.

141. II Openheimer International Law, Lauterpacht 138 (7th Ed. 1948).

142. Id.

143. Brierly, supra note 39, at 401-402.

144. Id., at 400-401; Green, supra note 86, at 685.

145. Id., Green, supra note 86, at 686.

146. Green, supra note 86, at 687.

147. Salpetzer and Waller, Armed Reprisals During Intermediacy - A Law Framework for Analysis in International Law, 17 Vil. L. Rev. 270, 280 (1971).

148. The General Treaty for the Renunciation War (Kellogg-Briand Pact, 1928) art. 2.

149. Id., art. 1.

150. League of Nations Covenant art. 12.

151. Brierly, supra 39, at 411-412.

152. Id.

153. Brownlie, supra note 36, at 281 and cases cited therein; Brierly, supra note 39, at 415.

154. The word reprisal is not mentioned in the Charter.

155. Brierly, supra note 39, at 415; Brownlie, supra note 36, at 281; Bowett, Reprisals Involving Recourse to Armed Force, 66 Am. J. Int'l. L. 1 (1972).

156. GA Res. 2625, supra note 106.

157. Bowett, supra note 155, at 7.

158. Id., at 8.

159. Bishop, International Law 47 (3rd ed. 1971) citing Dissenting Opinion of Judge Tanaka, South-West Africa Cases [1966] J.C.J. Rep. 248, 291-293.

160. Falk, The Beirut Raid and the International Law of Retaliation, 63 Am. J. Int'l. L. 415 (1969).

161. Id., at 427.

162. Id., at 443.

163. Id., at 427.

164. Id., at 434.

165. Id., at 441-442.

166. Bowett, supra note 155.

167. Id., at 10-11. Attached to Professor Bowett's article is an informative chart which outlines reprisal incidents since 1953, the action taken by the Security Council, and the reason for the action.

168. Id., at 11.

169. Id., at 13-20.

170. Salpetzer and Waller, supra note 147; Intoccia, supra note 72.

171. Shultz Says U.S. Should Strike Back, The Washington Post, Jan. 16, 1985, at A1.

172. Some Experts Contradict Shultz on Retaliation, The Washington Post, Jan. 26, 1986, at A25.

173. Taulbee and Anderson, supra note 139.

174. Id., at 334.

175. The Washington Post, supra note 171, at A28.

176. Brierly, supra note 39, at 339.

177. Green, supra note 86, at 686-687.

178. Public Report of the Vice-President's Task Force on Combatting Terrorism, at 1 (Feb. 1986).

179. Levenfeld, supra note 48, at 39. Suspension of this requirement would result in international chaos in the same manner that failure of a citizen of a state to resort to the courts to settle disputes would lead to internal chaos.

180. Supra, at 27.

181. Comment, The Legal Implications of Israel's 1982 Invasion Into Lebanon, 13 Cal. W. Infl. L. J. 458, 475 (1983).

182. Infra, at 38.

183. United Nations News Digest, Press Release WS/1252 4 Oct. 1985; The Foreign Minister of Tunisia stated that the attack was in an exclusive residential urban area.

184. Infra at 38.

185. Israel Mildly Condemns Latest Offer by Hussein, The Washington Post, September 30, 1985 at A21.

186. Time, supra note 3, at 43; Provisional Verbatim Records, infra notes 214, 216, 217, 226.

187. Approximately twenty-two Tunisian citizens were killed by this attack.

188. Bowett, supra note 155, at 11.

189. This type of attitude would indicate a violation of point eleven in Falk's twelve-point criteria for legal reprisal.

190. Levenfeld, supra note 48, at 40, citing Bowett, supra note 155, at 6.

191. New York Times, supra note 131. The majority of these killings, however, were not PLO directed.

192. This is the standard which is applied by the Security Council, Levenfeld, supra note 48, at 40; Intoccia, supra note 72, at 137. Bowett asserts that this standard also makes the Security Council's job easier. Bowett, supra note 155, at 9.

193. Levenfeld, supra note 48, at 40.

194. Bowett, supra note 155, at 13.

195. Levenfeld, supra note 48, at 43, citing Walzen, Just and Unjust Wars, at 151-59 (1977).

196. Id.

197. Article 33, Geneva Convention Relative to the Protection of Civilian Person in Times of War, Aug. 12, 1949, prohibits the taking of reprisal against protected civilians.

198. A raid of this nature would have also made the response by Israel more proportional than an attack with fighter aircraft.

199. Newsweek, supra note 1, at 53.

200. Dep't of Army, Pamphlet 27-1-1, Protocols to the Geneva Conventions of 12 August 1949 at 3-37, 135 (Sep. 1979).

201. Article 51 - Protection of the Civilian Population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population, as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

   (a) those which are not directed at a specific military objective;

   (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

   (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

   and consequently, in each such case, are of a nature to strike military objectives and civilians of civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

   (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a similar concentration of civilians or civilian objects; and

   (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination

thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

202. Id.

203. Id.

204. United Nations News Digest, Press Release WS/1253 Oct. 11, 1985 (emphasis added).

205. G. A. Res. 3314 (1974).

206. Id.

207. Id.

208. Bowett, supra note 155; Falk, supra note 160.

209. G. A. Res. 3314, supra note 205.

210. Reisman, The Incident as a Decisional Unit in International Law, 10 Yale J. Int'l. L. 1 (1984).

211. Id., at 5-7.

212. Id., at 4-5.

213. Willard, Incidents: An Essay in Method, 10 Yale J. Int'l. L. 21 (1984). This article discusses the model that should be used in analyzing an

international incident. Two parts of this model are the facts and the relevant norms of international law.

214. Provisional Verbatim Record, supra note 25.

215. Id.

216. Provisional Verbatim Record, supra note 27.

217. Id., at 28.

218. Provisional Verbatim Records, supra notes 25, 27, 31.

219. The Vice-President's Task Force on Combatting Terrorism, supra note 178 listed three main targets of terrorism: Israel; Western governments, and its citizens especially the United States, France, Italy, and Great Britain; and moderate Arab nations particularly Jordan, Egypt, Kuwait, and Saudi Arabia.

220. Provisional Verbatim Record, supra note 27, at 7.

221. Id.

222. Provisional Verbatim Record, supra note 27, at 39-40.

223. Id., at 42.

224. Id., at 11.

225. Id., at 10.

226. Provisional Verbatim Record of the 2613 Meeting of the Security Council, S/PV 2613, 3 Oct. 1985, at 44-46.

227. Id., at 51-56.

228. Provisional Verbatim Record, supra note 25, at 28-30.

229. Provisional Verbatim Records, supra note 27, at 8-9.

230. The Washington Post, supra note 17.

231. New York Times, supra note 20.

232. These countries were Australia, Burkina Faso, China, Denmark, Egypt, France, India, Madagascar, Peru, Thailand, Trinidad and Tobago, Ukranian Soviet Socialist Republic, Union of Soviet Socialist Republic, United Kingdom, and Northern Ireland, supra note 178 at 108.

233. Provisional Verbatim Record, supra note 226, at 63.

234. Provisional Verbatim Record, supra note 31, at 86-87.

235. United Nations News Digest, Press Release WS/1253, Oct. 11, 1985.

236. S/17554, Oct. 9, 1985.

237. G. A. Res. 40/61, U.N. Doc. A/40/01003 (1985).

238. S/Res/579 (1985), Dec. 18, 1985.

239. Id.

240. 84 Dep't State Bull. No. 2093, Dec. 1984, at 14.

241. Id. Secretary of State Shultz stated that such a claim is insidious.